

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLEE**

77-7041

IN THE
United States Court of Appeals
FOR THE SECOND CIRCUIT

DOCKET No. 77-7041

RUDOLPH V. ALOSIO,
Plaintiff,
v.

IRANIAN SHIPPING LINES, S.A., et al.,
Defendants.

ATLANTIC STEAMERS SUPPLY CO., INC.
OF PENNSYLVANIA, et al.,
First Intervening Plaintiffs,
v.

IRANIAN SHIPPING LINES, S.A., et al.,
Second Defendants.

IRANIAN SHIPPING LINES, S.A.,
Cross-Claimant-Appellant,
v.

PETER MORAITES, et al.,
Impleaded Defendants-Appellees.

JOINT BRIEF OF APPELLEES

Of Counsel:

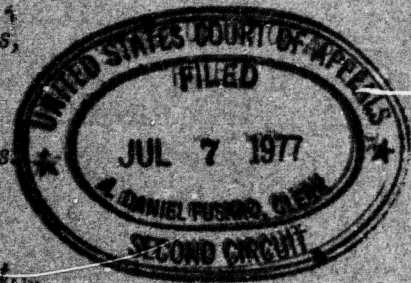
JAMES B. WEIDNER
JAMES M. RINGER
PETER M. DUGRE

ROGERS & WELLS
*Attorneys for Impleaded
Defendant-Appellee
Ayra Shipping Lines, S.A.*
200 Park Avenue
New York, New York 10017
(212) 972-7000

Of Counsel:

PHILIP PIERCE

BOOTH, LIPTON & LIPTON
*Attorneys for "Manta"
Appellees*
405 Park Avenue
New York, New York 10022
(212) 758-1700



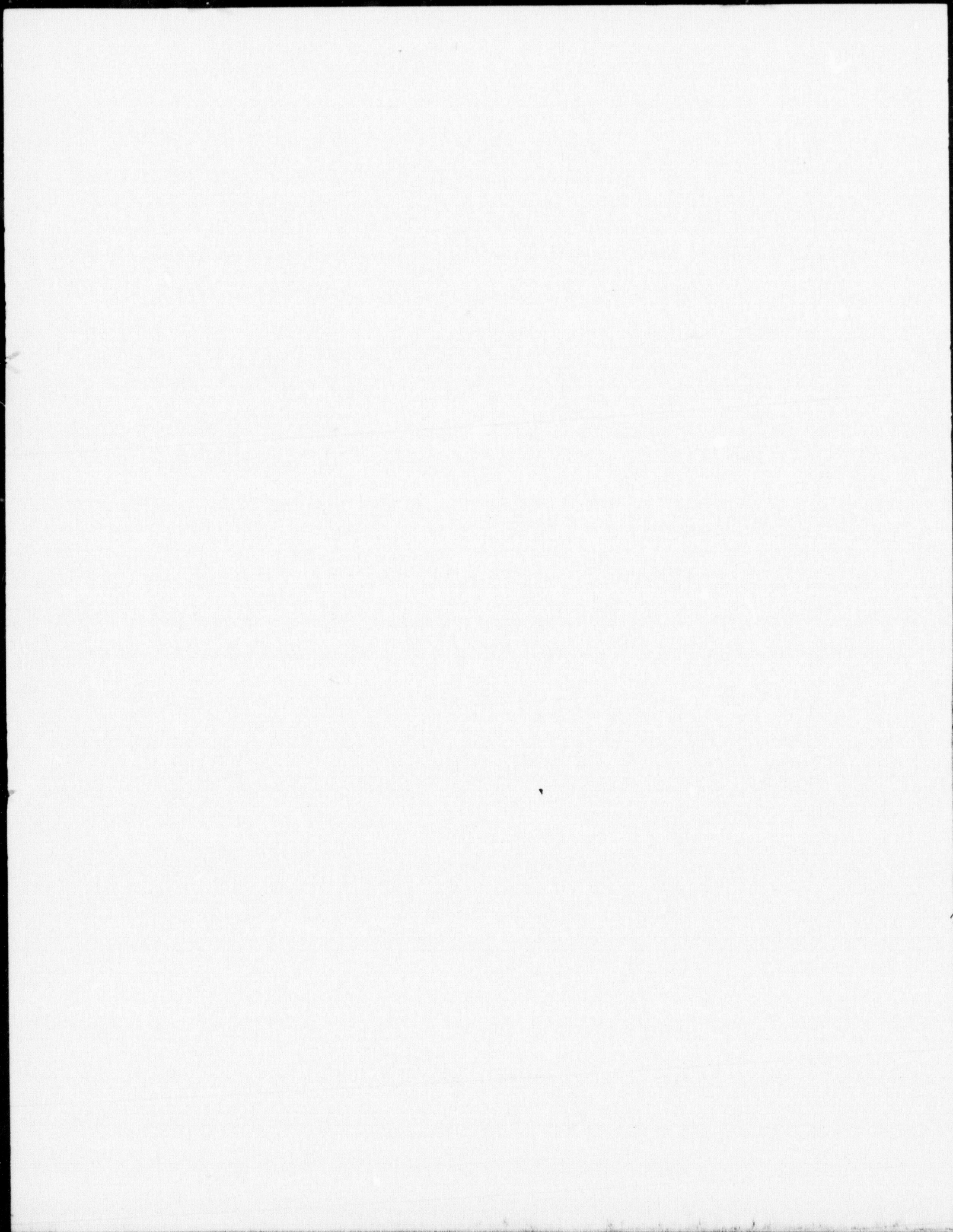


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In the
UNITED STATES COURT OF APPEALS
For the Second Circuit

Docket No. 77-7041

IRANIAN SHIPPING LINES, S.A.,

Cross-Claimant-Appellant,

v.

PETER MORAITES, et al.,

Impleaded Defendants-Appellees.

On Appeal from Judgment of Dismissal in
the United States District Court for
the Southern District of New York

JOINT BRIEF OF APPELLEES

This brief urges affirmance of a judgment pursuant to Rule 54(b) in the Southern District of New York which dismissed the purported cross-claim herein, after the District Court, Hon. Henry F. Werker, had granted appellees' motion for summary judgment because Iranian Shipping Lines ("ISL"), the appellant,

lacked capacity to prosecute its purported cross-claim. ISL, concededly, had been dissolved under the law of Iran, pursuant to which it had been organized. The Opinion of the District Court is reported at 426 F. Supp. 687.

Counterstatement of Issue Presented

ISL includes (Br. p. 2) several peripheral matters as purported issues on this appeal. In fact, there is only one dispositive issue:

Where ISL was admittedly a defunct Iranian corporation that had been dissolved under the law of Iran which provides no saving statute suspending the incidents of corporate death, did the District Court correctly hold that ISL lacked capacity to maintain the instant cross-claim?

Counterstatement of the Case

ISL has included a melange of irrelevant, and in many cases, incomplete or misleading information in its Statement of the Case (Br., pp. 3-15) which serve only to obfuscate the relevant facts and issues. * As will appear, the decision below

* We do not intend to burden the court with a response to each of these matters. One example

was based upon a small number of incontrovertible facts and a fundamental, long-standing, rule of law.

(a) Relevant Background

The corporate existence of ISL under Iranian law has been an issue in this case since ISL filed its cross-claim in March 1972, captioning the cross-claimant as "Iranian Shipping Lines, S.A., a corporation" and alleging by amendment to the pleading that it was a "corporation organized and existing under the law of Iran" (A 2a, 155a).*

(Footnote continued)

is illustrative. ISL states variously that its claims are supposedly "unrefuted", "amply proved" or "proven" (Br., pp. 4, 16). In fact, ISL's allegations have been denied and contested throughout by appellees. Furthermore, candor should have caused ISL to point out that the decision of Judge Frankel which it cites (Br., p. 4) in fact related to a motion to dismiss for lack of jurisdiction on which the merits were not considered. Indeed, as Judge Frankel noted (307 F. Supp. at 1119):

"To be sure, the charges of fraud and conspiracy in the Verified Complaint and Affidavits opposing motion may not prevail ultimately."

* References to ISL's Appendix are indicated by the letter "A" followed by the relevant page numbers. References to appellee's Supplemental Appendix, which we have been compelled to file because of ISL's failure to reproduce portions of the record as agreed, are indicated by the letters "SA" followed by the relevant page numbers.

Some three years earlier, in March 1969, the Iranian Parliament had promulgated a statute requiring that all Iranian Joint Stock Companies, such as ISL, file papers of reorganization within three years or they would be dissolved (SA 407-408). The initial three-year grace period was extended for an additional year by an amendment published in the Official Gazette of Iran in April 1972 (SA 408). The filing requirement was specifically brought to the attention of ISL through a communication from the Iranian Consulate (A 13a, 16a).

ISL, however, failed to comply with the prescribed filing requirements and, therefore, it was dissolved by operation of Iranian law on April 27, 1973 (SA 408). (In fact, Mr. Spanos, who is claimed to have been "managing" the cross-claim on behalf of ISL, when apprised of this communication, instead of taking some action pursuant thereto, simply chose to ridicule and ignore it (A 61a)).

ISL's dissolution was specifically raised in an answer filed to the cross-claim herein by Amhet Chafik, an Iranian and one of the cross-claim defendants. That answer, dated December 11, 1973, alleged as a defense (SA 401):

"Iranian Shipping Lines, S.A. as of the [sic -- this] date has no

corporate existence as it did not adopt itself to the recent enactments passed by the Legislative Body of the Imperial Government of Iran, within the time-grace allowed by such amendments."

In June 1976, Arya Shipping Lines ("Arya"), another cross-claim defendant, joined by other such defendants, moved for summary judgment based upon the April 1973 dissolution (SA 402, 649, 651), which motion was subsequently granted.

(b) The Summary Judgment Motion

The facts upon which the motion below were argued and decided, and accordingly the determinative facts upon this appeal, were simple and undisputed. As set forth in the Statement of Material Facts filed by Arya, those facts were (SA 404-405):

1. Iranian Shipping Lines, S.A. ("ISL") was organized in 1961 as a "Joint Stock Company," under the Commercial Code of Iran that had become effective in 1932.

2. In 1969, the Parliament of Iran amended the 1932 Code by providing that all pre-existing Joint Stock Companies, such as ISL, were required to transform themselves into one of the two new forms of organization ("Public" or "Private" Joint Stock Companies) or into a form of organization other than a Joint Stock Company.

3. The 1969 Amendments provided a three-year grace period for the consummation of the transformation referred to in ¶ 2 and further provided that all Joint Stock Companies failing so to transform themselves within the grace period would be dissolved.

4. In 1972, the grace period referred to in ¶ 3 was extended one year by the Iranian Parliament, so that it expired on April 27, 1973.

5. ISL never consummated the transformation referred to in ¶ 2.

6. Under Iranian law, ISL is considered as having been dissolved as of April 27, 1973, and, thereunder, lacks the capacity to maintain this litigation.

ISL, in response, did not dispute any of the matters specified in paragraphs 1-5 nor the fact of dissolution set forth in the first part of paragraph 6 of the Statement.* The record thus showed without dispute that ISL was a defunct Iranian Joint Stock Company which had been dissolved under the law of Iran for failure to comply with mandatory registration provisions thereunder. Iranian law does not include a provision suspending the incidents of corporate death, to give an entity such as ISL any continuing life; as ISL conceded in its opposing papers below, "there is no

* Rule 9(g) of the General Rules for the Southern District of New York requires that a party seeking summary judgment file a concise Statement of Material Facts as to which that party believes there is no genuine issue and provides that any fact so specified "will be deemed admitted unless controverted" by the opposing party. See also, Fed. R. Civ. P. 56(e), which requires that a response to a motion for summary judgment "must set forth facts showing that there is a genuine issue for trial."

savings statute for a specified period of time" under Iranian law. (ISL's Memorandum in Opposition to Motion for Summary Judgment, p. 2, filed July 9, 1976). "ISL", in short, was, and is, dead.

In response to the motion for summary judgment, ISL claimed only (SA 653) that it was "subject to the liquidation proceedings stipulated in the 1932 Commercial Code of Iran" and that it supposedly thereby had continuing capacity to maintain this litigation. But, under Iranian law, only a liquidator of a dissolved Joint Stock Company can have authority to wind up its affairs and to bring actions in its name (SA 659). No dissolution proceedings were begun, and no liquidator for ISL was appointed (SA 658).

ISL also pointed to a 1964 resolution of the ISL Board which purported to authorize Mr. Spanos to sue in the name of ISL. This resolution had been raised by ISL in opposition to an earlier motion to dismiss filed before Judge Brieant in May 1972, a year before ISL was dissolved. Obviously, the subsequent dissolution of ISL was not at issue on that motion, nor were the substance and effect of Iranian law presented to the court. As the court below noted (426 F. Supp. at 690, n.3; SA 687) in dismissing

the instant complaint, the earlier motion "was addressed to a different question of law and Judge Brieant denied it 'without prejudice to renew on a showing of facts indicating absence of actual authority.'" Additional facts were presented to Judge Werker that completely supported his Opinion dismissing ISL's cross-claim herein. Indeed, as the record shows (SA 660-661), if the 1964 resolution ever had any validity under Iranian law, it had long since ceased to be effective.

(c) The Decision Below

Based upon the facts before it, the District Court (426 F. Supp. 687; SA 681) found that ISL had been dissolved by operation of Iranian law on April 27, 1973 and, accordingly, had no capacity to maintain this litigation. The court noted that Iranian law contained no "savings" statute and that no liquidation proceedings had been commenced pursuant to the requirements of the law of Iran. The court found that Mr. Spanos, who ISL claims before this Court was somehow "managing" ISL's cross-claim, could not continue to maintain it. ISL, the cross-claimant, had been dissolved, and whatever capacity, if any, Spanos may have had to act on behalf of ISL had expired long before

the cross-claim was filed (426 F. Supp. at 689-90; SA 685-686).

As will be shown below, the District Court was clearly correct in dismissing the cross-claim and its decision should be affirmed.

I. THE DISTRICT COURT CORRECTLY HELD
THAT ISL, HAVING BEEN DISSOLVED
PURSUANT TO IRANIAN LAW UNDER
WHICH IT HAD BEEN ORGANIZED, LACKS
CAPACITY TO MAINTAIN THIS LITIGATION

While ISL argues (Br., p. 16) that this case is "bound to be a landmark" and involves a "novel" issue, the decision below in fact involved no more than a question of corporate capacity long settled in the Supreme Court, in this Court and in many other courts as well. The District Court, pursuant to Fed. R. Civ. P. 17(b), applied the law of Iran where ISL had been organized; found that ISL had been dissolved pursuant to that law; and accordingly held that ISL lacked capacity to maintain this litigation.

It has long been the law that a corporation dissolved under the laws of its place of incorporation is without legal capacity to maintain a suit in the federal courts and that all actions pending at the time of dissolution are abated, in the absence of a statute to the contrary. The Supreme Court enunciated

this principle in its seminal decision in Oklahoma Natural Gas Co. v. Oklahoma, 273 U.S. 257 (1927).

There, the Court held (259-60):

It is well settled that at common law and in the federal jurisdiction a corporation which has been dissolved is as if it did not exist, and the result of the dissolution cannot be distinguished from the death of a natural person in its effect. [Citations omitted.] It follows, therefore, that as the death of the natural person abates all pending litigation to which such a person is a party, dissolution of a corporation at common law abates all litigation in which the corporation is appearing either as plaintiff or defendant.

Accord, Chicago T & T Co. v. Forty-One Thirty-Six W. Wilcox Bldg. Corp., 302 U.S. 120, 124-128 (1937).

This rule has been followed repeatedly by courts in dismissing pending claims of corporations which have been dissolved.* It applies to suits based upon federal claims as well as to state-created causes of action. Chicago T & T Co. v. Forty-One Thirty-Six W. Wilcox Bldg. Corp., supra (petition for

* E.g., Mather Construction Co. v. United States, 475 F.2d 1152, 1155 (Ct. Cl. 1973); Katz v. Aspinwall, 342 F. Supp. 286 (N.D. Ala. 1971), aff'd mem., 459 F.2d 1045 (5th Cir.), cert. denied, 409 U.S. 1000 (1972); Beasley v. Fox, 173 F.2d 920 (D.C. Cir. 1949); Woodbury Granite Co. v. United States, 59 F. Supp. 150 (Ct. Cl. 1945); Seaboard Terminals Corp. v. Standard Oil Co., 35 F. Supp. 566 (S.D.N.Y. 1940).

reorganization under § 77B of the Federal Bankruptcy Act); Walder v. Paramount Publix Corp., 132 F. Supp. 912, 917 (S.D.N.Y. 1955) (action under federal anti-trust statutes); Seaboard Terminals Corp. v. Standard Oil Co., supra, 35 F. Supp. at 566, 569 (S.D.N.Y. 1940) (action under federal antitrust statutes).

The governing law in the instant case is that of Iran, where ISL had been incorporated. This is clear from Fed. R. Civ. P. 17(b), which provides: "The capacity of a corporation to sue or be sued shall be determined by the law under which it was organized." It is equally clear from applicable state conflicts of law rules.* In short, the court below was plainly correct in applying the law of Iran to determine ISL's capacity to sue.

ISL contends (Br., p. 17) that the District Court somehow "misconceived" the meaning of Fed. R. Civ. P. 17(b). Seeking to develop a theory of "general" capacity, ISL cites (Br., pp. 17-18) to the opinion of the District Court in Joseph Muller Corp. Zurich v.

* E.g., In Re Republique Francaise (Cellosilk Mfg. Co.), 309 N.Y. 269, 128 N.E.2d 250 (1955); In Re Matter of Nat'l Surety Co. (Laughlin), 283 N.Y. 68, 27 N.E.2d 505, cert. denied sub nom Laughlin v. Pink, 311 U.S. 707 (1940); Sinnott v. Hanan, 214 N.Y. 454, 108 N.E. 858 (1915).

Societe Anonyme De Ger. Etc., 314 F. Supp. 439 (S.D.N.Y. 1970), aff'd in part rev'd in part, 451 F.2d 727 (2d Cir.1971), cert. denied, 406 U.S. 906 (1972), as "the leading case on this matter" and claims that it supports ISL's position on this appeal. Not so. As confirmed by the decision of this Court in Muller on appeal (which ISL fails even to cite), that case, to the extent it is relevant at all, completely supports the opinion of the District Court herein. The principal issue in Muller was whether a foreign treaty precluded setting venue in this country of an action between two foreign entities. On that question the court held that Rule 17(b) concerned questions of capacity, not of venue (i.e., whether, not where, a corporation can sue), and therefore the treaty provision could have no bearing on the determination of capacity under that Rule. That holding, of course, has nothing to do with this case.

What is of direct relevance from Muller, in part an antitrust case, is its holding that the capacity of a corporation to sue at all (there, conceded by the parties) is to be determined under Rule 17(b) by the law of its place of organization, even if that place is a foreign country (451 F.2d at 728). In short, ISL is correct that Muller has application to

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this case, but, so applied, that case confirms exactly why the decision below should be affirmed. Once dissolved for failure to comply with Iranian law, ISL simply had no further capacity, "general" or otherwise.

The incidents of corporate life are extinguished upon dissolution, unless the state of corporate organization has provided a specific "savings" statute for that purpose. As the Supreme Court put it in Oklahoma Natural Gas, supra:

"[C]orporations exist for specific purposes, and only by legislative act so that if the life of the corporation is to continue even only for litigating purposes it is necessary that there should be some authority for the prolongation."
(273 U.S. at 259.)

See also, Chicago T. & T. Co. v. Forty-One Thirty-Six W. Wilcox Bldg. Corp., supra, at 124-25. But as the District Court noted, and as ISL conceded in the court below (see supra. pp. 6-7), Iranian law contains no savings statute. The Iranian Parliament appears instead to have announced the dissolution of non-complying Joint Stock Companies such as ISL four years in advance, thereby prolonging their existence by a specified period prior to dissolution. As Dr. Sabi, an Iranian attorney and a recognized authority on the law of Iran stated by affidavit to the court below (SA 657, 680):

"[D]issolved Joint Stock Companies such as ISL have absolutely no corporate capacity under Iranian law to prosecute this or any other litigation. Whether or not such dissolution occurred prior to or subsequent to commencement of the litigation, the operative effect of ISL's dissolution under the law of Iran is the same - the capacity to maintain the litigation, if any, immediately ceased upon the dissolution of ISL as a corporate entity.*

In short, the limited exception accorded by "savings statutes" to the general rule of corporate dissolution has no application to this case.

ISL does not contend to the contrary. Instead, here, as in the District Court, ISL purports to find the requisite capacity by arguing (Br., p. 19) that ISL was "subject" to dissolution proceedings under the 1932 Commercial Code of Iran. ISL's argument as to capacity was, and is, unsupported by any proof, expert or otherwise, and is directly contrary to the expert

* Compare, e.g., Oklahoma Natural Gas Co. v. Oklahoma, supra (Oklahoma statute provided that "no action whereto any such corporation is a party shall abate by reason of such dissolution"); Chicago T. & T. Co. v. Forty-One Thirty-Six W. Wilcox Building Corp., supra (Illinois statute provided that corporations whose powers have expired "shall continue their corporate capacity for two years for the purpose only of collecting debts due such corporation. . . .")"

testimony of Dr. Sabi. (Indeed, in response to the motion below, ISL submitted no proof whatsoever except an affidavit by its own attorney (SA 654) containing nothing more than his own legal argument--hardly amounting to the "significant probative evidence" required to defeat a motion for summary judgment. First Nat'l Bank v. Cities Service Co., 391 U.S. 253, 290 (1968). See also Fed. R. Civ. P. 56(e).

Moreover, ISL's argument in this respect is simply immaterial, since ISL is now dead as a corporate entity under Iranian law. Perhaps, if dissolution proceedings had been commenced in Iran and a liquidator had been properly appointed in accord with that law, then that liquidator may have had capacity to prosecute claims. But, no liquidation proceedings were commenced, and no liquidator was appointed (SA 657-659).

As the Court below properly found (426 F. Supp. at 689), the Iranian Commercial Code of 1932 provides two specific and exclusive methods for appointment of a liquidator for a Joint Stock Company, one by a shareholder vote at a meeting called according to specific requirements, and the other by order of an Iranian court of first instance upon a proper application (SA 657-658). There is no dispute as to these requirements; ISL concedes them (Br., p. 19). Nor is

there any dispute that the requirements were never met (SA 658).

Contrary to ISL's effort to demean these prerequisites of Iranian law as "parochial procedur[e]" (Br., p. 22), the requirements are a basic part of the laws governing corporate structure and operations in Iran. By requiring appointment of a liquidator who is to act as a fiduciary on behalf of the entire corporate interest, these requirements, similar to those in this country (see, e.g., N.Y.B.C.L. §§ 1001, 1111, McKinney's (1963)), protect a dissolved entity like ISL against what otherwise could be self-interested actions of a minority faction, such as the prosecution of a litigation which, although purportedly on behalf of the entity, would in fact constitute a waste of its corporate assets. As the District Court held below, these requirements are directly applicable to this case. This would be so whether the requirements are regarded as part of the determination of capacity under Fed. R. Civ. P. 17 (b) or even under general principles of conflict of laws. Restatement (Second) of Conflict of Laws § 229, Comments a, b, g (1971)). The Supreme Court put it succinctly in Oklahoma Natural Gas Co. v. Oklahoma, supra:

"The matter [corporate capacity] is really not procedural or controlled by the rules of the court in which the litigation pends. It concerns the fundamental law of the corporation enacted by the state which brought the corporation into being." (273 U.S. at 260.)

Here, the "fundamental law" of ISL as enacted by Iran, the sovereignty that brought ISL into being, plainly provides that ISL has no capacity. That law is not to be brushed aside as "parochial procedure"; it is controlling, and it bars ISL's purported cross-claim.

ISL's contention is not aided by its citation (Br., p. 21) to Compania Ron Bacardi, S.A. v. Bank of Nova Scotia, 193 F. Supp. 814 (S.D.N.Y. 1961), which ISL misconstrues (*id.*) as having held that, once "general" capacity of a corporation is established, the conditions for bringing an action are controlled by the laws of this country. The case says nothing of the sort. Ron Bacardi related to extraordinary and limited circumstances where assets of a corporation had been confiscated by nationalization decrees in Cuba, contrary to the interests of the United States. It reflected no more than a refusal by United States courts to recognize a foreign policy antithetical to that of

our country, an element obviously lacking here.*

Nor, contrary to ISL's implication (Br., pp. 20-21), does the fact that ISL's cross-claim purported to sound under the antitrust laws change the applicability of the foregoing rules concerning corporate capacity. For, as the Supreme Court put it in Chicago T. & T. Co. v. Forty-One Thirty-Six W. Wilcox Bldg. Corp., supra, in holding that the dissolved corporation there lacked capacity even to commence reorganization proceedings under the Federal Bankruptcy Act:

"[I]t hardly will be claimed that the federal government may breathe life into a corporate entity thus put to death by the state in the lawful exercise of its sovereign authority ... if the State attach qualifications to its sentence of extinction, nothing can be added to or taken from these qualifications by federal authority."
(302 U.S. at 128.)

* As the District Court stated in the Ron Bacardi case (193 F. Supp. at 815):

"[D]efendant's challenge on the issue of corporate existence is denied on the ground that the public policy of our nation is antithetical to the recognition of the Cuban government's confiscatory decree with respect to property outside Cuba...."

Finally, ISL's reference (Br., pp. 21-22) to instances where the law of the state of incorporation returns a "murky" answer as to capacity is also of no significance here, not only because those cases, relating to particular questions concerning partnerships, are factually inapposite, but because the answer returned by Iranian law on this question is, despite ISL's efforts to create confusion, abundantly clear. There is no dispute that ISL, by failing to comply with the registration provision set forth in the 1969 amendments to the Iranian Commercial Code, has been dissolved under the law of that country. A certificate issued by the Registrar of Companies and Industrial Properties of the Iranian Ministry of Justice (SA 642-644) confirmed that ISL had failed to make the required change in its corporate structure and therefore that:

"[T]he said Company is considered as having been dissolved as of ... April 27, 1973 and is subject to the liquidation proceedings stipulated in the Commercial Code...."
(SA 643)

No liquidation proceedings were begun (SA 658), and, as Dr. Sabi stated in his affidavit submitted to the court below:

"[D]issolved joint stock companies such as ISL have absolutely no cor-

porate capacity under Iranian law to prosecute this or any other litigation." (SA 657)

In short, the District Court was correct in holding that ISL lacks capacity to maintain this cross-claim and in dismissing it. The decision below should be affirmed.

II. THE DISTRICT COURT PROPERLY HELD
THAT SPANOS HAD NO CAPACITY TO
MAINTAIN ISL'S CROSS-CLAIM

ISL next argues that its cross-claim should not have been dismissed because Spanos somehow had "capacity to manage the suit on behalf of ISL" (Br., p. 23). We, frankly, do not understand what ISL intends to argue in this respect. ISL refers (*id.*) to the sentence of Rule 17(b) relating to individuals acting in a "representative" capacity, but the instant claim was not commenced as a representative action.*

* The "representative capacity" discussed in the third sentence of Rule 17(b) appears from the writings and cases interpreting that section to apply to executors, guardians, administrators and the like. E.g., 2 Barron & Holzoff, Federal Prac. & Proc., § 486.

Accordingly, the question at issue is not whether Spanos had capacity to "manage the suit on behalf of ISL," but whether ISL had the capacity to maintain the suit at all. Spanos' alleged capacity to "manage" is simply irrelevant to ISL's capacity to litigate.

The result would be the same even if the cross-claim arguendo had been filed "representatively." It is black letter law that a representative can have no greater capacity than the entity he purports to represent. (E.g., Official Comment (a) to Restatement (Second) of Agency § 120 (1958), "One cannot act on behalf of a non-existent person"; W. Seavey, Agency § 48 (1964)). This doctrine has equal application to a corporate context, whether in derivative suits or otherwise.* If this were not the law, it would lead to the untenable conclusion that a corporation could circumvent the laws of its place of origin merely by designating various collection agents to "manage" its claims.

* E.g., Walder v. Paramount Publix Corp., 132 F. Supp. 912, 917 (S.D.N.Y. 1955); Potter v. Walker, 276 N.Y. 15, 27 (1937); Alexander v. Donohoe, 143 N.Y. 203, 211, 38 N.E.263 (1894); Nelson v. Miller, 212 So.2d 67 (Fla. App. 1968).

Nor could Spanos claim to derive any capacity to "manage", let alone maintain, the cross-claim, from his status as a former director of ISL. As the District Court held and as the unrefuted record shows*, Spanos' term and authority as a Director expired no later than May 31, 1969, nearly three years before the cross-claim was filed. ISL recognizes this, as it concedes (Br., p. 24) that Spanos "never relied on his position as a director as authority" for managing the cross-claim.

ISL's reliance (Br., pp. 24-25) upon a board resolution passed in 1964 provides no greater support

* E.g., Sabi Aff. (SA 660) which stated:

"Mr. Spanos' term of office as a Director or Managing Director of ISL has expired. Therefore, even if liquidation proceedings had been properly commenced, which they have not, Mr. Spanos would lack the authority to prosecute this or any other litigation on behalf of ISL as a Director/Liquidator upon the purported authority of such expired offices."

Iranian law has no "holdover" doctrine which would permit tenure beyond the elected term (SA 660). Where a corporation is dissolved and no longer a going concern, American courts also do not permit "holding over." Berl v. Crutcher, 60 F.2d 440, 444 (5th Cir. 1932), cert. denied, 287 U.S. 670 (1933)

for its position. Again, the dispositive question is the capacity of ISL, not of Spanos. Moreover, even if it were relevant, the 1964 resolution, whatever its effect may have been at one time, expired under Iranian law, as the District Court found, when the term and authority of the ISL Board expired on May 31, 1969. Dr. Sabi put it succinctly in his affidavit filed below (SA 660):

"Under Iranian law, the authority, if any, given to Spanos to act as agent for the Board of Directors, was terminated on May 31, 1969 (prior to institution of this action) upon the expiration of the term of office of the Board of Directors, Spanos' principal."*

Furthermore, it is obvious from the face of the 1964 Board resolution that it did not relate to dissolution proceedings eight years later (as, indeed, it could not under Iranian law; see Sabi Aff., SA 661). Even under the law of this country, "[a]uthority conferred upon a corporate officer during the lifetime of the corporation cannot be invoked as a justification

* Iranian law would govern this question, even if as suggested by ISL (Br., pp. 24-25) reference were made under the third sentence of Rule 17(b) to the law of New York, since that law would include conflict of laws principles. Klebanow v. New York Produce Exchange, 344 F.2d 294, 297 (2d Cir. 1965).

for his acts after its corporate death, where the acts are not designed and calculated to wind up the affairs of the company ..." 16A Fletcher, Cyclopedia of Private Private Corporations § 8117 at 270 (1962). Any suggestion that ISL's cross-claim was somehow part of liquidation proceedings as to it is completely belied, as the District Court found, by Count III thereof which sought to enjoin the commencement of any such liquidation proceedings. The cross-claim stated in part (¶48):

"Forty-eight percent of the shares of ISL are opposed to any dissolution or end of its corporate existence. . . . Under ISL's Articles of Association, a resolution to dissolve or liquidate ISL cannot legitimately be carried if it is opposed by as many as forty-eight percent of the shares issued and outstanding." (A 180a-180a-1)

In summary, ISL's argument as to Spanos' alleged capacity to "manage" its claim is no more than a red-herring. The absence of capacity in ISL, which purported to bring the cross-claim, is dispositive. Even if Spanos' capacity were the issue, his capacity could be no greater than that of ISL, which is naught. Moreover, ISL concedes that Spanos did not derive any capacity to maintain the cross-claim from his status as a former director of ISL, and even brief analysis of

the 1964 resolution shows that it, too, would fail to supply the missing capacity. For these reasons, too, the decision below should be affirmed.

III. ISL'S ARGUMENTS OF SUPPOSED
PROCEDURAL IRREGULARITIES AND
OTHER MISCELLANEOUS CONTENTIONS
ARE WITHOUT MERIT

Having exhausted even the semblance of a substantive argument, ISL contends that miscellaneous procedural matters require reversal of the court below. These contentions are without substance.

ISL first complains (Br., pp. 26-27) that the District Court failed to provide a pre-motion conference before the motion for summary judgment was filed and declined to permit ISL to file a surrebuttal brief. Regulation of proceedings before a district court is, of course, within that court's discretion (Fed. R. Civ. P. 83) and will not be disturbed absent a showing of patent abuse. E.g., In re United Corp., 283 F.2d 593, 596 (3d Cir. 1960). Plainly, no abuse occurred here. The "pre-motion conference" to which ISL apparently refers is a procedure adopted by Judge Werker several months after the instant motion for summary judgment had been filed. The absence of such a procedure, clearly not mandated by the Federal Rules, certainly cannot be an abuse of discretion. Further,

ISL was plainly on notice that such it would not have the opportunity to file a surrebuttal brief. Judge Werker's procedure in this regard was published over a month before the instant motion for summary judgment was filed in June 1976. (See, e.g., New York Law Journal, May 14, 1976, p. 25, and each date thereafter through August 6, 1976). The procedure was also brought to the attention of counsel in this case by a letter dated June 28, 1976 from Judge Werker's law clerk, circulated to all attorneys in this action.* Moreover, the matters (e.g., the alleged capacity of Mr. Spanos) that ISL claims to have been "precluded" from answering were raised, not by the moving parties, but by ISL in its answering papers. The reply affidavit of Dr. Sabi submitted by appellees simply responded to the matters first raised by ISL, and, contrary to ISL's suggestion (Br., p. 2), in no way "altered the nature of the motion."

* That letter in part stated that the motion would "be taken on submission due to the fact that Judge Werker will not be hearing oral argument for the months of July and August.... Reply papers will be accepted from the movant only...." (SA 648). It was sent to counsel for Arya Shipping Lines, the movant, with a request that it be circulated to all counsel, which was immediately done (SA 684A).

ISL also argues (Br., p. 27) that the affidavits submitted by Dr. Sabi were "inconsistent" because the first affidavit stated that ISL lacked any corporate capacity while the second affidavit, ISL contends, stated that ISL did have capacity if the requirements for liquidation had been followed. This argument is disingenuous at best. Dr. Sabi repeated, almost verbatim, in his second affidavit precisely what he had said in the first:

"[D]issolved joint stock companies such as ISL have absolutely no corporate capacity under Iranian law to prosecute this or any other litigation." (Compare SA 409 with SA 657).

Thus, there was no "inconsistency" as claimed by ISL, and no question of "veracity" was raised.

ISL even goes so far as to suggest (Br., p. 28) that the court below should have inferred that, really, ISL never had been a corporation at all and therefore that the registration/dissolution requirement for Joint Stock Companies was inapplicable thereto. ISL raises this novel suggestion for the first time before this Court. The contention is completely inconsistent with the position that ISL had taken from the time it filed its cross-claim describing itself as "Iranian Shipping Lines, S.A., a corporation"

and alleging that it was "a corporation organized and existing under the laws of Iran," to the time it filed its brief upon this appeal. Not having been raised below, the contention should not be considered here. Indeed, given its complete failure to dispute its corporate status as set forth in paragraph 1 of the Statement of Material Facts filed in support of the motion below (See supra p. 6), ISL is estopped from contesting it now. The fact that ISL even finds it necessary to make such an argument before this Court simply confirms the patent lack of substance to its position.

ISL next claims (Br., pp. 28-29) that the District Court improperly resolved supposed "factual issues" as to the ability of directors to act as liquidators under Iranian law. Again, the argument is without substance. Aside from the fact that, as the District Court noted, the matter relates to an issue of foreign law, a legal not factual question (see Fed. R. Civ. P. 44.1), the issue is simply immaterial to this litigation. Whether or not directors may act as liquidators under Iranian law (and they cannot without the proper authorization required by that law; SA 657-659) ISL concedes (Br., p. 24) that Spanos, who has not been a director of ISL since May 1969,

"never relied upon his position as a director" as authority for managing this lawsuit.

Finally, we note that there is no substance to two phantom issues which seem to lurk in plaintiff's brief (pp. 5-6, 10) -- that appellees had failed to include "any specific negative averment" under Fed. R. Civ. P. 9(a) challenging the capacity of ISL to sue, and that Arya did not give any notice under Fed. R. Civ. P. 44.1 that it intended to raise an issue of foreign law. ISL is simply wrong. As stated supra, pp. 4-5, an answer filed by one of the cross-claim defendants did expressly raise ISL's lack of capacity by virtue of its failure to comply with the amendments to the Iranian Code. That averment was plainly sufficient to put ISL on notice, and it satisfied the prerequisites of Rule 44.1 as to all cross-claim defendants. (See Advisory Committee Notes to Rule 44.1, "If notice is given by one party it need not be repeated by any other...", 5 Moore's Federal Practice, ¶ 44.1.01[2]).

In short, ISL's miscellaneous arguments, like those discussed above, are without merit and confirm that the decision below should be affirmed.

Conclusion

As demonstrated above, ISL admittedly has been dissolved under the law of Iran, pursuant to which it was created. It has no capacity to maintain this or any other litigation, nor can Mr. Spanos provide the capacity that ISL so patently lacks. In short, the District Court was correct in dismissing the cross-claim, and, accordingly, the judgment below should be affirmed.

Dated: July 7, 1977

Respectfully submitted,

Of Counsel:

James B. Weidner
James M. Ringer
Peter M. Dugre

ROGERS & WELLS
Attorneys for Arya
Shipping Lines
200 Park Avenue
New York, New York 10017
(212) 972-7000

Of Counsel:

Philip Pierce

BOOTH, LIPTON & LIPTON
Attorneys for George L.
Manta, Helen Manta,
Mark F. Manta, Leo J.
Manta and Mark F. Manta
as Co-Executor of the
Estate of John J. Manta,
J. L. Manta, Inc., Manta
Vin-Cor Steel Corporation,
Manta Investments Inc.,
Christ Karafotias, Paul
Demos, Seymour F. Simon,
Demos, Karafotias &
Carones, a partnership,
and Telis Demos d/b/a
Demos Travel Bureau
405 Park Avenue
New York, New York 10022
(212) 758-1700

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Index No. 72 Civ. 1392
67 Civ. 9

RUDOLPH V. ALOSIO,

Plaintiff

against

IRANIAN SHIPPING LINES, S.A., et al.

Defendant

Docket No. 77-7041

AFFIDAVIT OF SERVICE
BY MAIL

STATE OF NEW YORK, COUNTY OF NEW YORK

ss.:

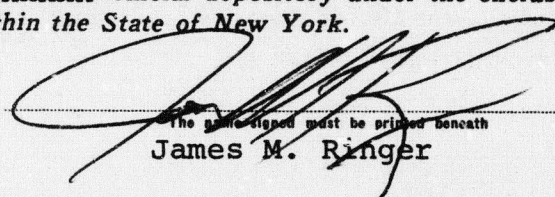
The undersigned being duly sworn, deposes and says:

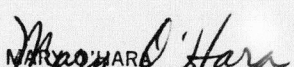
Deponent is not a party to the action, is over 18 years of age and resides at Richard Somers
Road, Granite Springs, N. Y. 10527

That on July 7, 19 77 deponent served the annexed Brief of
Appellees (2 copies)
on attorneys for the parties listed on attached sheet
attorney(s) for
in this action at their addresses (see attached list)
the address designated by said attorney(s) for that purpose by depositing a true copy of same enclosed
in a postpaid properly addressed wrapper, in ~~in proper form~~ official depository under the exclusive care
and custody of the United States Postal Service within the State of New York.

Sworn to before me this 7th

day of July, 1977


The name signed must be printed beneath
James M. Ringer


MARY D'HARA
NOTARY PUBLIC, State of New York
No. 2948375

Qualified in Kings County
Certificate filed in New York County
Commission Expires March 30, 1979

Index No.

against

Plaintiff

Defendant

**ATTORNEY'S
AFFIRMATION OF SERVICE
BY MAIL**

STATE OF NEW YORK, COUNTY OF

ss.:

*The undersigned, attorney at law of the State of New York affirms: that deponent is
attorney(s) of record for*

That on

19

deponent served the annexed

on

attorney(s) for

in this action at

*the address designated by said attorney(s) for that purpose by depositing a true copy of same enclosed
in a postpaid properly addressed wrapper, in—a post office—official depository under the exclusive care
and custody of the United States Postal Service within the State of New York.*

The undersigned affirms the foregoing statement to be true under the penalties of perjury.

Dated

.....
The name signed must be printed beneath

Attorney at Law

Morton L. Ginsberg, Esq.
Attorney for Basil Vlavianio
666 Fifth Avenue
New York, New York

Howard L. Jacobs, P.C.
Attorney for Guaranty Bank & Trust Company
401 Broadway
New York, New York 10013

Levin, Kreis, Ruskin & Gyory, Esqs.
Attorneys for Robert Kreis, Levin, Kreis,
Ruskin & Gyory
529 Fifth Avenue
New York, New York 10017

Haight, Gardner, Poor & Havens, Esqs.
Attorneys for South Shipping Company, S.A., Iran
Line, S.A., Jan C. Uiterwyk, Jan C. Uiterwyk Co., Inc.
1 State Street Plaza
New York, New York 10004

Lowenstein, Sandler, Brochin, Kohl & Fisher, Esqs.
Attorneys for John Pensec
744 Broadway Street
Newark, New Jersey 07102

Peter Moraites, Esq.
Robin Lane
Alpine, New Jersey

Poles, Tublin, Patestides & Stratakis, Esqs.
Attorneys for Amber Maritime Corp.
46 Trinity Place
New York, New York 10006

Edward Berman, Esq.
Alfred A. Porro, Jr., Esq.
Attorneys for Rudolph Alosio
10 Stuyvesant Avenue
Lyndhurst, New Jersey 07071

David Simon, Esq.
Attorneys for Nasser Afshar, Yvonne Afshar,
Edward Swinburne
350 Fifth Avenue, Room 6101
New York, New York 10001

Blinder, Steinhaus & Hochhauser, Esqs.
Attorneys for John Pensec
655 Madison Avenue
New York, New York 10021

Booth Lipton & Lipton, Esqs.
Attorneys for George L. Manta, Frank J. Manta,
Stephen A. Manta, Leo J. Manta, Leo J. & Frank J.
Manta as co-executors, J. L. Manta Inc., Manta
Vin-Cor Steel Corp., Manta Investments, Inc.,
Christ Carafotias, Seymour Simon
405 Park Avenue
New York, New York 10022

Eugene Gressman, Esq.
1828 L Street, N.W.
Washington, D.C. 20036

